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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/821,823	04/09/2004	David Louis Kirschman	KRS 002 P2	1386
34232	7590	12/29/2005	EXAMINER	
MATTHEW R. JENKINS, ESQ. 2310 FAR HILLS BUILDING DAYTON, OH 45419			COMSTOCK, DAVID C	
			ART UNIT	PAPER NUMBER
			3733	

DATE MAILED: 12/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/821,823

Applicant(s)

KIRSCHMAN, DAVID LOUIS

Examiner

David Comstock

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 October 2005.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-128 is/are pending in the application.
4a) Of the above claim(s) 23-25, 58, 59, 62, 63, 95-97 and 100-128 is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-22, 26-57, 60, 61, 64-94, 98 and 99 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
10) ☒ The drawing(s) filed on 26 July 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 12/04.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

Applicant's election of Species I in the reply filed on 11 October 2005 is acknowledged. Because applicant did not distinctly and specifically point out any supposed errors in the restriction requirement, the election has been treated as an election **without** traverse (MPEP § 818.03(a)). Applicant indicated that Species 1 relates to claims 1-22, 26-61, 63-94, 98 and 99. However, it is noted that claims 58, 59 and 63 also appear to be drawn to the non-elected species. Accordingly, claims 23-25, 58, 59, 62, 63, 95-97 and 100-128 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim.

Drawings

The drawings were received on 26 July 2004. These drawings are accepted.

Specification

In the Brief Description of the Drawings, referring to Fig. 1, "a view of a showing a disk" is unclear and requires correction.

The Abstract is objected to because the language "This invention relates to" is improper. Applicant is reminded of the proper language and format for an abstract of the disclosure:

The language [of the Abstract] should be clear and concise and should avoid using phrases which can be implied, such as, "The disclosure concerns," "The disclosure defined by this invention," "The disclosure describes," etc.

Appropriate correction is required.

Claim Objections

Claims 22, 51 and 94 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim.

Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form. These claims recite an intended condition with respect to the human body but do not further limit the claimed invention in any substantive way.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-22, 26-57, 60, 61 and 64-94 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is noted that the claims are replete with inconsistent and unclear terminology. Thorough review and correction is required.

Claim 1, line 2, it is unclear how a vertebra can physically be "in a spinal cord."

Claim 4, lines 1-2, "said predetermined angle is approximates the angle..." does not make sense and renders the scope of the claim unclear.

Claim 6, "said retainer system" lacks antecedent basis.

Claim 13, after "members" it appears that --are-- should be inserted.

Claim 26, "said frame" lacks antecedent basis.

In claim 27, it is unclear how the "first support" and "second support" differ from the support already mentioned in claim 26, from which claim 27 depends.

Claim 53, "said first and second mounts" lacks antecedent basis.

Claim 60, "said third support" lacks antecedent basis.

Claim 64, line 6, "said artificial disk" lacks antecedent basis.

In claim 72, after "loading" it appears that --of-- should be inserted.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 6-13, 16-22, 26-34, 37-42, 45-57, 60, 61, 64-77, 80-85, 88-94, 98 and 99, as best understood, are rejected under 35 U.S.C. 102(b) as being anticipated by Navas (5,375,823).

Navas discloses a vertebral stabilization device comprising a first support 10, a second support 70, a third support 3, a first compression body area 13, a first compression body 4, a second compression body area 14, and a second compression body 6 (see, e.g., Fig. 10). The planar members are parallel to each other and are at a right angle with respect to a spine 10. The device comprises an adjustable tensioner screw 30. The compression bodies are selected from bodies having different shapes and densities for each compression body area (see, e.g. col. 3, lines 54-57). The

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device is attached to the spine via a latching socket connection and a plurality of fasteners 9 having cylindrical support mounts. It is noted that the neck of the ball joint is also a cylindrical support mounted to the vertebrae with a bone screw.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5, 14, 15, 35, 36, 43, 44, 78, 79, 86, 87, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Navas (5,375,823).

Navas discloses the claimed invention except for the acute, 30 degree, or less than 60 degree angular offset with respect to the spine. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the planar supports at an acute angle, an angle of 30 degrees, or an angle of less than 60 degrees, with respect to the spine, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Comstock whose telephone number is (571) 272-4710. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



D. Comstock
27 December 2005



PEDRO PHILOGENE
PATENT EXAMINER